



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 67 OF 2015

HEZBON TAABU BIRIRI.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. J. Mitei. Resident Magistrate in Rongo Senior Resident Magistrate's Court Criminal Case No. 136 of 2014 delivered on 05/06/2015)

JUDGMENT

1. The Appellant herein, **Hezbon Taabu Biriri**, was charged with the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act** No. 3 of 2006 and in the alternative committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. He denied both counts.
2. The particulars of the offence of defilement were that on diverse dates between 25th April 2014 and 28th April 2014 at [particulars withheld] village in Migori County within the Republic of Kenya, intentionally caused his penis to penetrate the vagina of Q. A. M. a child aged 15 years.
3. The appellant was subsequently tried, convicted on the main count of defilement and accordingly sentenced.
4. The prosecution called six witnesses in support of its case. The minor testified as **PW1** (hereinafter referred to as '**the complainant**') whereas her brother, **D O M**, testified as **PW2**. **PW3** was the complainant's Aunt and who was also the guardian. She was called **R A O**. The arresting officer was **No. 241804 APC Martin Mureithi** from Ranen AP Post in Awendo Sub-County who testified as **PW4** whereas the investigating officer was one **No. 81231 PC Chengo Unda** from Awendo Police Station who testified as **PW6**. **PW5** was a Clinical Officer then working at Awendo Sub-County Hospital one **Immaculate Ogutu**. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except for the complainant.
5. The prosecution laid its case against the appellant based on the evidence of its witnesses. **PW3** was a sister to complainant's brother who passed on. She lived with the complainant together with her children and another orphan at her home in Ng'ong'a. She operated a shop at Awendo and would leave her home in the morning and return later in the evening. The 25/04/2014 was a unique day to **PW3**. When **PW3** returned home that the evening she did not see the complainant. On enquiry from the rest of the children she was informed that the complainant had gone to a neighbor's home and on return she went to the river and the other children thought that she had gone to pick some vegetables, but she did not return. Disturbed as she was, **PW3** nevertheless decided to spend the night.
6. It must have been a very long night for **PW3**. By 06:00am the following morning **PW3** was up and rushed to the neighbor's home. She met the owner of that home one **Simon Onyango** (not a witness) and on enquiry Simon told **PW3** that indeed the complainant had been there the previous day and borrowed his phone to make a call and left after making the call. That, the person whom the complainant had called later called again after the complainant had left and asked Simon to pick him from Ng'ong'a SDA Church as he was a guest of the complainant and he was new in the area. The person was a man. Simon did so and brought the man to his home. That, the man asked to see the complainant and Simon asked his wife who went and called the complainant. The man and the complainant later left Simon's home.
7. **PW3** got the number which the complainant had used to call the man from Simon and called it, but it was off. Simon told me that the man told him he was from Mbita and that he was called Hezbon. **PW3** recalled that **PW2** used to work at Mbita and decided to ask him if he knew Hezbon. **PW2** told **PW3** that one of his neighbors was known by that name, but he required time to ascertain if he was the one.
8. **PW2** was given the mobile phone number which the complainant had used to call Hezbon by **PW3** and he ascertained that the number was that of the Hezbon who was his neighbor. **PW2** called Hezbon in vain that day. He however managed to get through to Hezbon the following day and upon enquiry Hezbon told **PW2** that she had picked the complainant from Ng'ong'a and he had left her at his home in Chamgiwadu as he proceeded to Awendo. **PW2** asked Hezbon to return to his home and return the complainant to where he picked her from and then

proceed to meet him at Mbita.

9. PW2 and Hezbon met at PW2's house at Mbita later in the evening of that day where Hezbon informed PW2 that the complainant was with his relative in Rongo township. They agreed that the following morning they will proceed to Rongo and pick the complainant and return her to Ng'ong'a. The two rode on Hezbon's motor cycle the following day to Rongo and collected the complainant from a hotel room and headed home while still riding on Hezbon's motor cycle. PW2 was updating PW3 on all the developments and PW3 had long reported the matter to the Area Assistant Chief and the District Officer and she had been told on how the police at Ranen would assist to arrest both Hezbon and the complainant. PW3 had been informed by PW2 that he was proceeding to Ng'ong'a with the complainant and Hezbon. PW3 however proceeded to Ranen where she was to collect her money from someone and she was surprised to see the complainant abode a stationary motor cycle with a rider she did not know. PW3 hurried to the police at Ranen and informed them and the complainant and Hezbon were arrested by PW4. PW3 later learnt that the motor cycle had been stopped at Ranen for PW2 to buy some airtime. PW4 escorted and handed over the complainant and Hezbon to Awendo Police Station.

10. PW6 commenced investigations and referred both the complainant and Hezbon to Awendo Sub-County Hospital where they were both examined by PW5 and the complainant later treated. PW5 filled in the P3 Forms which she later produced before court as exhibits alongside the treatment notes. Upon completion of the investigations which included the ascertainment of the age of the complainant from her Certificate of Birth PW6 charged Hezbon accordingly. PW6 produced the Certificate of Birth as an exhibit. All the witnesses identified Hezbon as the appellant. On further enquiry the complainant revealed that he met the appellant at Mbita where she had gone to visit PW2 who was a neighbor to the appellant and the appellant seduced her into a sexual relationship. That, she accepted, and the appellant gave her his cell phone number and asked her to call him once in Ng'ong'a and that is why the complainant had later called the appellant.

11. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant opted to and gave sworn statement without calling any witness. The appellant denied committing the offence and contended that he had been framed and charged to curtail him from pursuing his debt of Kshs. 30,000/- he had advanced PW2. He denied knowing the complainant and stated that he had been arrested at Ranen by the County Government officials because of his motor cycle's sticker which was instead for Homa Bay County Government as he was heading to Sori with PW2 where PW2 was to be paid some money out of the sale of his sugarcane and then pay the appellant. He alleged that upon his arrest PW2 rushed and collected the loan agreement form they had both signed from the appellant's wife and could not therefore produce it in court. That, he was surprised to be charged with the offences which to him were unfounded.

12. By a judgment rendered on 05/06/2015 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to 20 years imprisonment upon mitigations.

13. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal with the leave of this Court and filed his Petition of Appeal on 26/08/2015 challenging both the conviction and sentence. He preferred the following five grounds of appeal: -

1) THAT the learned trial magistrate grossly erred both in law and fact in convicting and sentencing I the appellant without considered that I pleaded not guilty to the offence charged and plea of not guilty entered.

2) THAT the learned trial magistrate grossly erred both in law and fact in proceeding and/or taking the evidence of the complainant without affording I the appellant adequate time and/or facilitate to acquaint himself (appellant) with the charge sheet which is patently defective, consequently the charge preferred against I the appellant herein contravene and/or constitute the provision of section 77 of the new constitution of Kenya.

3) THAT the learned trial magistrate grossly erred both in law and fact in finding and holding that the prima – facie case had been proved beyond reasonable doubts pertaining the age of the girl (complainant) without considering that the respondent case was not well established.

4) THAT the learned trial magistrate grossly erred both in law and fact in convicting and sentencing I the appellant on the minors evidence when the salient ingredients of the offence charged had been capture and/or established principals of law consequently the judgment of the trial court was illegally unattainable.

5) THAT the learned trial magistrate further grossly erred both in law misapprehended the tenor extend and the nature of offence charged had not corporate with the evidence on record consequently, the judgment of the trial magistrate is coloured with error and omission thus rendering same manifestly unsafe.

5. The appeal was heard by way of written submissions where the appellant expounded the foregone grounds. He submitted that the charge of defilement had not been proved and that the judgment was not supported by the evidence. He also submitted that the charge was defective as it related to one Q.A.M. whereas the medical documents referred to Q.A.O. The appellant also contended that he had not properly identified as the assailant and that there had been no DNA examination which was conducted to link him to the offence. The appellant relied on some judicial decisions in his submissions. He urged this Court to allow the appeal. The State opposed the appeal and relied on the record to support the conviction. This Court was urged to dismiss the appeal.

6. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

7. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the written submissions.

8. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them.

(a) On the age of the complainant:

9. The age of the complainant was not seriously contested in this appeal. The prosecution produced the complainant's Certificate of Birth No. [particulars withheld] as proof of age which indicated that the complainant was born on 05/09/1998 to **M O O** and **S A O**. The complainant was hence 15 years and 8 months old at the time of the commission of the alleged offence.

(b) On the issue of penetration:

10. **Section 2** of the Sexual Offences Act defines penetration as:

'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

11. This position was fortified in the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

'...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ....' (emphasis added).

12. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

13. The appellant strenuously contended that penetration was not proved. PW5 testified that she examined the complainant three days post the alleged sexual act and that the complainant was in her menses. That, the hymen was missing though had not been freshly broken and the external genitalia was normal. That, the complainant was also subjected to a high vaginal laboratory examination where the examinations were in the negative save for the presence of red blood cells in the urine. PW5 did not therefore avail any medical evidence on penetration.

14. But what did the complainant say of the alleged ordeal? She partly stated as follows: -

'....I went to sleep with Hezbon. We slept with him on the same bed. We had sex with him. We did not use a condom. He used his penis and slept on me. He inserted his penis on my thing the organ that I use to urinate. He did it once and then we slept till morning....'

On 26/4/2014 I was still at that home.....up to evening and then slept at that home again. I slept in the same house I had slept the other day. We also had sex once that night.....'

15. The evidence of the complainant was the only evidence on the aspect of penetration. How then did the trial court handle the issue? The court was alive that the only evidence on penetration was the complainant's. It referred to **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya and the Court of Appeal decision in **Mohamed vs. Republic (2006) 2 KLR 138** where the Court re-emphasized the legal position that courts are no longer hamstrung by the requirements of corroboration in sexual matters. The trial court also noted that the evidence of PW5 confirmed that the hymen had been broken. The court stated in the judgment that: -

'...I observed the demeanor of PW1 as she testified while putting down my observations on record; her evidence was consistent and cogent detailing how.....met her and took her to her home and how they had sex two consecutive nights. I had no reason to doubt it since by law and precedence a court has power to receive and convict even on uncorroborated evidence of a child where for reasons set down, the court is cautiously satisfied that the child spoke the truth....'

16. The trial court then believed the evidence of the complainant which partly touched on the aspect of penetration. I have carefully reconsidered how the trial court handled the evidence of the complainant. The court fully addressed itself to the law and rightly so. There is nothing the Appellant put forth to suggest that the court arrived at a wrong finding in believing the evidence of the complainant. Since the trial court had an opportunity to gauge the demeanor of the witnesses I must give allowance to that.

17. Before I come to the end of this issue, I must restate what I have previously said in several decisions that whereas a DNA examination is one way of proving penetration, it is however not the only way in view of the description of penetration in **Section 2** of the **Sexual Offences Act**.

18. Going by the aforesaid, I find and hold that the complainant engaged into sexual acts with a male counterpart and as such penetration was proved.

c) On whether the appellant was the perpetrator:

19. The complainant testified on how she met the appellant at PW2's house in Mbita where the appellant was a neighbor to PW2 and became friends and later met and went to stay at the home of the appellant. PW2 narrated how he was informed by PW3 that the complainant had disappeared from home at Ng'ong'a and was given a mobile phone number which eventually turned out to be of the appellant. When PW2 called the appellant, the complainant was present and overheard the conversation. It was the appellant who led PW2 to where the complainant was at Rongo before the three set off for Ng'ong'a and were eventually arrested at Ranen.

20. The complainant stayed with the appellant for a couple of days. They ate and slept together on the same bed. They had sex as well. PW2 stayed with the appellant in the same house. The appellant did not dispute that he also knew PW2. PW2 confirmed that it was the appellant who was arrested at Ranen, a position which the appellant confirmed. PW4 arrested the appellant, PW6 escorted the appellant to hospital examination and PW5 examined the appellant at the hospital. All these witnesses were clear that they referred to the appellant. Their collective evidence forms a chain so cogent that the complainant was not mistaken in contending that she had sex with the appellant.

21. In arriving at the foregone holding I have also considered the defence. The Appellant alluded to being framed up by PW2 because of a debt which PW2 was yet to pay him. Without seen as shifting the burden of proof which rests on the prosecution throughout, the Appellant did not raise the issue with any of the witnesses including PW2 and even PW6 who would have investigated the same. The issue came up at the very tail end of the trial. Be that as it may, the trial court considered the defence in the judgment. I concur with the analysis of the trial court on the defence. The defence was not a holding one and is hereby dismissed.

Other issues raised by the Appellant:

22. There was the contention that the evidence did not support the charge in that the name of the complainant in the charge sheet and the P3 Form and treatment notes were different. I have also confirmed that the names are truly different. Having perused the Certificate of Birth I have noted that the father to the complainant was called 'M O O' hence the use of the name 'O' and 'M' interchangeably by the complainant. That aside, all the witnesses referred to the complainant and even PW5 who examined her confirmed that she filled in the P3 Form for the complainant whereas PW6 confirmed that he issued the P3 Form to the complainant.

23. Having found all ingredients of the offence of defilement in favor of the prosecution, this Court finds that the appellant was properly found guilty and convicted.

24. On sentence, as the complainant was a child aged 15 years and 8 months, the appellant was to be sentenced under **Section 8(4)** of the Sexual Offences Act. He was instead sentenced under **Section 8(3)** of the Sexual Offences Act which deals with the sentence where the victim is between 12 years and 15 years old. Since the complainant was well past 15 years old, the appellant was to partake the advantage of a lower minimum sentence. The trial court sentenced the appellant to the minimum sentence under **Section 8(3)** of the Sexual Offences Act and going by that exercise of discretion on the part of the sentencing court I find that the appellant ought to benefit from the minimum sentence under **Section 8(4)** of the Sexual Offences Act.

14. I hereby set aside the 20 years imprisonment sentence and substitute it with a sentence of 15 years imprisonment. Consequently, save that the appeal on sentence succeeds, the appeal on conviction is dismissed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 07th day of June 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Hezbon Taabu Biriri the Appellant in person.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyn Nyauke – Court Assistant